BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOB MARTIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,447
PAGE TRUCKING	)	
Respondent	)	
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO. and	)	
COMMERCIAL UNION INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on April 11, 2002.

Issues

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment. The ALJ concluded "There are may [sic] possibilities for the cause of an inguinal hernia. Because of this, coupled with the inconsistencies in the testimony, and the length of time which this condition has existed, the Court finds that the Claimant has failed to sustain his burden of proof that his inguinal hernia arose out of and in the course of employment."[1]

Claimant contends the ALJ erred and asserts claimant has sustained his burden of proving he suffered injury by accident arising out of and in the course of his employment with respondent resulting in an inguinal hernia injury and also injury to his back.

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[1] Order, p. 2 (April 11, 2002).

Respondent and its insurance carriers (respondent) contend the ALJ's Order should be affirmed. According to respondent, not only has claimant failed to meet his burden of proving accidental injury arising out of and in the course of his employment, which was the basis for the ALJ's denial, but in addition, claimant has failed to prove he provided respondent with timely notice and written claim. Respondent contends it first became aware of this claim when it received a letter and written claim form from claimant's attorney dated January 4, 2002. [2]

Findings of Fact and Conclusions of Law

After reviewing the record compiled to date and considering the arguments, the Appeals Board (Board) finds that the ALJ's Order should be affirmed.

Claimant alleges a specific work-related accident on November 18, 1999 when he slipped while lifting some ramps on a trailer and felt pain in his back and groin. Claimant also alleges that each and every working day thereafter he suffered aggravations of his injuries beginning November 18, 1999 until the last day he worked for respondent on or about June 5, 2001.

Claimant testified that he reported his work-related injury to Joseph Page, the owner of the respondent company, within a day or two after the November 18, 1999 accident and subsequently discussed his injury and need for medical treatment with Mr. Page on many other occasions. However, claimant told Dr. Murati during his January 15, 2002 examination, that he did not turn the injury in to workers compensation because he was afraid of being terminated. When presented with this inconsistency during cross examination claimant explained that he was afraid to report his injury to Mr. Page at the time it occurred, but nevertheless two days later he did report it. Why then, over two years later when he was asked by Dr. Murati for the reason why he never had the surgery recommended by Dr. Cedeno, would claimant answer that ". . . he had not turned in this injury to work comp yet due to being afraid of being terminated"? [3] This explanation simply makes no sense, particularly when claimant had not worked for respondent since June 2001. Furthermore, during his direct examination claimant testified that the reason he did not have the surgery was because Mr. Page refused to pay for it, not because he was afraid to report it to Mr. Page or to workers compensation.

Also, claimant testified that his low back pain started at or around the same time as his groin pain, but Dr. Murati's report indicates that claimant stated his low back pain

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[2] Tr. of Prel. H., Claimant's Ex. 2 (April 10, 2002).

[3] Tr. of Prel. H., Claimant's Ex. 1 (April 10, 2002).

started in 2001. "He (claimant) feels that it may be possibly due to him lifting different because of the groin pain."[4]

Mr. Page testified that claimant never mentioned a work-related injury nor did claimant request that respondent provide him with medical treatment for a hernia. Mr. Page stated that he was unaware that claimant had suffered any physical injury while employed by respondent. When claimant quit his job with respondent in June 2001, he told Mr. Page that he was going to seek employment which afforded medical insurance benefits. But claimant said nothing about needing health insurance for a work-related injury. Instead, claimant said that he felt a need for insurance because he was getting older. Furthermore, after claimant left his employment with respondent he began working for himself operating a back-hoe, the same type of work that he did for respondent. At the time of his preliminary hearing testimony, claimant was operating a back-hoe for another company, Windsor Excavating.

Claimant first sought medical treatment from his family physician, Dr. Gellender. This was probably sometime in early November, 1999, because claimant said it was about two weeks before he saw Dr. Cedeno on November 19, 1999. Dr. Gellender's records are not in evidence but claimant said he did not provide Dr. Gellender with an accurate history of his injury. However, Dr. Gellender referred claimant to a surgeon, Dr. Philip A. Cedeno whose records are in evidence. At that November 19, 1999 examination Dr. Cedeno noted that claimant gave a history of a left sided groin mass for approximately five months with a rapid increase in size from two weeks ago. Dr. Cedeno's records also make mention of the injury being work-related, but indicate an injury date in July 1999. Claimant denies being asked how his injury occurred and denies giving Dr. Cedeno that history. Claimant admits that he did not mention his back pain to Dr. Cedeno.

At that time, Dr. Cedeno diagnosed a left symptomatic groin hernia and recommended left inguinal hernia or herniorrhaphy surgery. But claimant sought no additional medical treatment until he was sent by his attorney to Dr. Murati on January 15, 2002.

Dr. Murati diagnosed claimant with a left inguinal hernia as well as a lumbosacral strain with signs of right side radiculitis. Dr. Murati likewise recommended claimant undergo surgical repair of the left inguinal hernia. He also recommended physical therapy for claimant's low back complaints.

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[4] Tr. of Prel. H., Claimant's Ex. 1, p.1 of Dr. Murati's report (April 10, 2002).

After Dr. Cedeno's examination, which occurred one day after the alleged date of accident, claimant presented a history of symptoms for five months. There was no mention of a recent work-related trauma. Conversely, Dr. Murati's examination occurred more than seven months after claimant last worked for respondent. During those intervening months claimant had continued to work as a back-hoe operator, the same job he performed for respondent.

Claimant's testimony is fraught with inconsistencies and his allegations are not otherwise supported by the record. The credibility of respondent's witness, Mr. Page, is likewise called into question. He admits to manipulating his method of paying claimant's wages allegedly at claimant's request to avoid paying a certain judgment creditor and wage garnishments. Claimant disputes this. It is argued that this arrangement was for respondent's benefit in order to avoid paying social security taxes. Nevertheless, it is claimant that bears the burden of proof. The Board finds that claimant has failed to prove a direct causal connection between his current condition and his work activities with respondent on the dates alleged and has further failed to prove timely notice and written claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish on April 11, 2002, should be and is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2002.

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BOARD MEMBER

c: William L. Phalen, Attorney Claimant
Ronald J. Laskowski, Attorney for Respondent and Insurance Carrier
Michael R. Kauphusman, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director